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6

7 **UNITED STATES DISTRICT COURT**  
8 **SOUTHERN DISTRICT OF CALIFORNIA**  
9

10 IN RE: MIDLAND CREDIT ) **Case No.: 11-md-2286 MMA (MDD)**  
MANAGEMENT, INC., TELEHPONE )  
11 CONSUMER PROTECTION ACT ) from N.D. Ill. 1:14-cv-04818  
LITIGATION. )  
12 ) **MOTION TO DISMISS WITHOUT**  
13 ) **PREJUDICE AS TO MARY GAMBLE**  
14 )  
15 )

16 Pursuant to Federal Rule of Civil Procedure 41(a)(2), Plaintiff, MARY GAMBLE  
17 (“Plaintiff”), hereby moves for an Order dismissing her action against Defendant, MIDLAND  
18 CREDIT MANAGMENET, INC. (“Defendant”), without prejudice. This Motion will be based  
19 on the following Memorandum of Points and Authority.

20 **MEMORANDUM AND POINTS OF AUTHORITY**

21 **I. INTRODUCTION**

22 Plaintiff initially filed her lawsuit on June 25, 2014, against Defendant in the United  
23 States District Court for the Northern District of Illinois (case no. N.D. Ill. 1:14-cv-04818) under  
24 the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. § 1692 *et seq.*, and the Telephone  
25 Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* Plaintiff’s allegations were based

1 on her own personal experience with Defendant and being subjected to Defendant's harassing  
2 collection practices. Subsequently, Plaintiff's lawsuit was transferred before this Honorable  
3 Court due to the TCPA violation. Defendant has filed its Answer to the TCPA allegations.  
4 Now, Plaintiff now moves for voluntary dismissal of her claim without prejudice pursuant to  
5 Federal Rule of Civil Procedure 41(a)(2).

## 6 **II. LEGAL STANDARD**

7 If, as is the case here, the adverse party has served an Answer, dismissal is available to a  
8 Plaintiff only upon order of the Court and upon such terms and conditions as the Court deems  
9 appropriate. Fed.R.Civ.P. 41(a)(2). The trial court has considerable discretion in deciding  
10 whether to allow the withdrawal of a claim with prejudice. *Wakefield v. N.Telecom, Inc.*, 769  
11 F.2d 109, 114 (2nd Cir. 1985). "Generally...a voluntary dismissal under Rule 41(a)(2) will be  
12 allowed if Defendant will not be prejudiced thereby." *Id.* at 114. Here, Defendant will suffer no  
13 legal prejudice if Plaintiff's motion is granted.

## 14 **III.ARGUMENT**

15 Defendant will not be prejudiced if Plaintiff's motion to dismiss is granted. "Factors  
16 relevant to a court's decision whether or not to grant a motion to dismiss with prejudice include  
17 [1] plaintiff's diligence in bringing the motion; [2] any "undue vexatiousness" on plaintiff's  
18 part; [3] the extent to which the suit has progressed, including the defendant's effort and  
19 expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy  
20 of plaintiff's explanation for the need to dismiss. *Zagano v. Fordham Univ.*, 900 F.2d 12, 14  
21 (2d Cir. 1990).

22 None of these factors warrant denying Plaintiff's motion. Plaintiff was not dilatory in  
23 bringing the motion. This instant motion was not made to harass or annoy, but instead to bring  
24 the litigation of Plaintiff's TCPA claim to a conclusion without further expense on the part of  
25

1 either party. This has not been a protracted lawsuit; rather, Plaintiff brought suit for violations  
2 of the TCPA, and FDCPA, in good faith.

3 Further, Plaintiff's purpose in seeking to voluntarily dismiss this complaint is so that she  
4 can pursue her FDCPA claim against Defendant without the TCPA claim. Plaintiff is aware that  
5 by pursuing her FDCPA claim without the related TCPA claim, any resolution of the FDCPA  
6 claim will also resolve the TCPA she could have brought against Defendant based on the facts  
7 involved in this case.

8 Further, Plaintiff attempted to confer with Defendant's counsel to obtain an amicable,  
9 joint dismissal of Plaintiff's action without prejudice, which Defendant declined without a  
10 dismissal with prejudice. There has not been any adjudication of Plaintiff's claims on the merits  
11 thereby warranting a dismissal of Plaintiff's claims with prejudice. Further, as argued *supra*,  
12 dismissal of Plaintiff's claim without prejudice is appropriate under these circumstances. As  
13 Plaintiff has brought the instant motion in a timely manner, and dismissal will not prejudice  
14 Defendant, Plaintiff's Motion to Dismiss without Prejudice should be granted.

#### 15 **IV. CONCLUSION**

16 For the foregoing reasons, Plaintiff respectfully requests that the Court dismiss this action  
17 against Defendant without prejudice.

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20 Date: March 5, 2015

Respectfully submitted,

/s/ Adam T. Hill  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 5, 2015, a true and correct copy of the foregoing was filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all parties of record.

/s/ Adam T. Hill  
Adam T. Hill